ORAL ARGUMENT HELD SEPTEMBER 29, 2017
NOS. 15-1344 & 15-1428

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

INTERNATIONAL LONGSHORE & WAREHOUSE UNION;
INTERNATIONAL LONGSHORE & WAREHOUSE UNION, LOCAL 8;
INTERNATIONAL LONGSHORE & WAREHOUSE UNION, LOCAL 40,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

ICTSI OREGON, INC.,

Intervenor for Respondent.

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR
ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF ON REHEARING *EN BANC* OF PACIFIC MARITIME ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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CERTIFICATE OF PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), *amicus curiae* Pacific Maritime Association certifies that:

(A) **Parties and *Amici***

Except for *amicus curiae* Pacific Maritime Association, all parties, intervenors, and *amici* appearing in the proceedings before the National Labor Relations Board and in this Court are listed in the Brief for Petitioners. *Amicus curiae* is not aware of other *amici* intending to file.

(B) **Rulings under Review**

References to the rulings at issue appear in the Brief for Petitioners.

(C) **Related Cases**

As stated in the Brief for Petitioners, this case was not previously before this Court. As of the date of this filing, *amicus* is aware of the following related cases pending before other courts:

1. *ILWU, et al. v. ICTSI Or., Inc.*, No. 14-35504 (9th Cir.); and
2. *ILWU, et al. v. ICTSI Or., Inc.*, 3:12-cv-01058-SI (D. Or.).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, *amicus curiae* Pacific Maritime Association certifies the following: it has no outstanding shares or debt securities in the hands of the public, and does not have a parent company. Therefore, no publicly held company has a 10% or greater ownership interest in *amicus curiae*.

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GLOSSARY

CBA	Collective Bargaining Agreement
ILA I	*NLRB v. Int'l Longshoremen's Ass'n*, 447 U.S. 490 (1980)
ILA II	*NLRB v. Int'l Longshoremen's Ass'n*, 473 U.S. 61 (1985)
ILWU	International Longshore and Warehouse Union
PMA	Pacific Maritime Association

STATUTES AND REGULATIONS

Pertinent materials are contained in Petitioners' addendum.

STATEMENT OF INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE

Pacific Maritime Association ("PMA") is a multi-employer collective-bargaining association that negotiates and administers collective bargaining agreements ("CBAs") on behalf of approximately 70 member companies operating or serving ports along the Pacific Coast of the United States. PMA negotiates and administers these agreements with the International Longshore and Warehouse Union, petitioner here, and these agreements cover roughly 22,000 ILWU-represented dockworkers at 29 ports along the Pacific Coast.

PMA and the ILWU enjoy a historic relationship that originated from a coast-wide strike that began in 1934. This "Big Strike" economically crippled the Pacific Coast and significantly affected the national economy. After this strike was settled in 1934, the Board established a coast-wide, multi-employer bargaining unit of longshore workers. *See Shipowners Ass'n of the Pac. Coast.*, 7 N.L.R.B. 1002, 1010-18 (1938), *petition for review dismissed sub nom. Am. Fed'n of Labor v. NLRB*, 103 F.2d 933 (D.C. Cir. 1939), *aff'd*, 308 U.S. 401 (1940). Since that time, PMA and its predecessor organizations have negotiated multi-employer bargaining agreements with the ILWU for nearly 80 years.

PMA therefore has a distinct perspective on the importance of stable, consistent rules governing multi-employer CBAs. The Board's decision in this case departs—without explanation—from controlling Supreme Court precedent, as well as the precedent established by this Court, that has guided collective bargaining in this industry for over 30 years. *See NLRB v. Int'l Longshoremen's Ass'n* ("*ILA I*"), 447 U.S. 490 (1980); *NLRB v. Int'l Longshoremen's Ass'n* ("*ILA II*"), 473 U.S. 61 (1985); *Cal. Cartage Co. v. NLRB*, 822 F.2d 1203 (D.C. Cir. 1987).

The panel's decision fails to correct the Board's unexplained departure from this controlling precedent, which is the essence of arbitrary agency decision-making. *Ramaprakash v. FAA*, 346 F.3d 1121, 1124-25 (D.C. Cir. 2003). It leaves PMA with no guidance about how the Board will interpret and apply the law in future cases. The uncertainty created by the Board's decision threatens to destabilize critical negotiations to preserve work in the face of technological change. PMA therefore respectfully submits this *amicus* brief in order to urge this Court to grant the ILWU's petition for rehearing *en banc* so that the confusion created by the Board's decision can be corrected.

PMA contemporaneously moves this Court pursuant to Federal Rule of Appellate Procedure 29(b) for permission to file this brief as *amicus curiae*.

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

Counsel for *amicus curiae* Pacific Maritime Association authored this brief, and no party or counsel for a party authored any part of this brief. No person other than *amicus* contributed money to fund the preparation or submission of this brief.

BACKGROUND

Effective multi-employer collective bargaining is crucial to national labor peace. It typically arises where a single union represents many or all of a unionized industry's employees, and enables multiple employers to "bargain 'on an equal basis'" with that powerful union. *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 410 n.3 (1982). These multi-employer negotiations exist in numerous industries in addition to the maritime industry, including the construction, hotel, professional sports, and trucking industries. The resulting multi-employer agreements can bind dozens of employers and tens of thousands of employees, covering billions of dollars' worth of production or services. *See, e.g.*, Rhonda Smith, *UFCW, Teamsters Members OK Pact for 30,000*, DAILY LABOR REPORT, Apr. 29, 2016; Michael Rose, *New York Nurses Ratify Contracts Covering 17,000*, DAILY LABOR REPORT, Aug. 5, 2015.

Congress has concluded that multi-employer CBAs facilitate sound labor policy. *See NLRB v. Truck Drivers Local Union No. 449*, 353 U.S. 87, 95 (1957). While employers are typically better off bargaining collectively, an individual employer may stand to benefit even more if every *other* employer bargains collectively, while *that* employer avoids the deal. Multi-employer agreements therefore require predictable, bright-line rules preventing employers from seeking these agreements' advantages while shirking the agreements' obligations.

Clear rules are especially important when multi-employer bargaining attempts to define the scope of work performed by employees who are represented by the union. Industry-wide changes in how employers operate due to new technologies or a changing economic climate can create or destroy entire classes of work, leaving both employees and employers to adapt. When these changes make work or jobs obsolete, multi-employer associations and a union often enter into a work-preservation agreement to mitigate harm to workers. These multi-employer work-preservation agreements enable employers and employees to equitably allocate the gains from innovation without costly strikes or lockouts. *See, e.g.*, Janet Koech, *Cheaper By the Box Load: Containerized Shipping a Boon for World Trade*, GLOBALIZATION & MONETARY POL'Y INST. 2013 ANN. REPORT, March 2014, at 6-7.

Absent stable, multi-employer work-preservation agreements, resulting labor disputes can quickly escalate to national concerns. In 2002, PMA and the ILWU were initially unable to agree how to respond to technological changes, and the resulting lockout crippled commerce along the Pacific Coast. The dispute grew so significant that then-President Bush invoked the Taft-Hartley Act to enjoin the work stoppage. *See United States v. Pac. Mar. Ass'n*, 229 F. Supp. 2d 1008, 1008-09 (N.D. Cal. 2002). That injunction power exists only when a strike affects "an entire industry or a substantial part thereof" that, if permitted, "will imperil the

national health or safety." 29 U.S.C. § 176. Thus, labor disputes in the maritime industry can harm the national economy, but Taft-Hartley injunctions are only a temporary solution. Disputes of this magnitude must ultimately be resolved by agreements reached through multi-employer bargaining.

These crucial agreements—especially in the maritime industry—require stable rules. The Board's decision introduces intolerable uncertainty as to how industry-wide work-preservation agreements may be made and enforced. Specifically, it casts doubt on how these can be made and enforced when an individual employer voluntarily enters into an inconsistent agreement with a third party. By ignoring controlling Supreme Court and D.C. Circuit precedent on this very issue in this very industry, the Board has disrupted settled expectations that have governed the negotiation and enforcement of work-preservation agreements in multi-employer bargaining. This Court should grant *en banc* rehearing to consider the nationally significant implications of the Board's arbitrary departure from clear and stable precedent that has guided multi-employer bargaining in this industry for well over 30 years.

ARGUMENT

I. The Panel's Agreement With The Board's Departure From Established Precedent Introduces Intolerable Uncertainty About The Scope Of Valid Work-Preservation Agreements.

Work-preservation agreements maintain labor peace and stabilize employment in many industries. They define the scope of work that is to be performed by employees in a multi-employer bargaining unit. Because work-preservation agreements are such an essential element of a multi-employer CBA, both the U.S. Supreme Court and this Court have defined these agreements' proper scope in numerous cases, including cases arising in the maritime industry specifically. *See ILA I*, 447 U.S. at 507; *ILA II*, 473 U.S. at 84; *Cal. Cartage*, 822 F.2d at 1207.

The Board's failure to even acknowledge this well-established precedent in the maritime industry introduces intolerable uncertainty into employer-union relationships in this important industry—and many other industries of national importance. This case therefore "involves a question of exceptional importance." Fed. R. App. P. 35(a)(2).

Work-preservation agreements resolve disputes that arise when a large number of jobs may be eliminated due to transformational changes in an industry. Through a work-preservation agreement, employers and unions can agree to provide jobs for dislocated employees—either by relocating employees to the same

job at another location, to a similar job, or both. Hence this Court's flexible approach to work-preservation agreements, holding that "the fact that [dislocated employees] have never previously performed work at the exact same location does not prevent the work sought from being the functional equivalent of [that] work." *Cal. Cartage*, 822 F.2d at 1207. Necessarily so: work-preservation agreements are designed to find acceptable substitutes for employees, not perfect ones—which cannot exist when an industry undergoes transformational changes.

The Supreme Court's analysis of the legality of work-preservation objectives, therefore, is "informed by an awareness of the congressional preference for collective bargaining as the method for resolving disputes over dislocations caused by the introduction of technological innovations in the workplace," and is therefore solicitous of work-preservation agreements. *ILA I*, 447 U.S. at 511. Substitute work need not be "the most rational or efficient response" to a dislocation—only a "permissible effort to preserve jobs." *Id.* Employers enjoy broad latitude in fashioning acceptable ways to preserve work—such as, for example, an agreement to use displaced labor for loading or emptying cargo within 50 miles of an affected site. *ILA II*, 473 U.S. at 84. As the Board's General Counsel has put it, a work-preservation agreement is valid "if a majority of the work in question has traditionally been performed by employees in the bargaining unit"—even if specific employees working for a given member company in that

multi-employer bargain "have never performed the work." *Int'l Longshoremen's Ass'n (Bermuda Container Lines)*, No. 4-CE-107, 1997 WL 731472, at *2 (NLRBGC Aug. 22, 1997).

Amicus and similar multi-employer groups—along with their counterpart unions—have therefore negotiated work-preservation agreements on the assumption that the standard established in the *ILA* cases will govern. If employers need only find reasonably similar substitute work for workers displaced due to industry changes, then employers will have more flexibility to adapt to change. This flexibility empowers employers and unions to resolve disputes that arise in these transformational circumstances and reduces resistance to innovations that will displace some workers, but will promote efficiency in the industry overall. In short, this flexibility is essential to promoting labor peace, which is the core policy of federal labor laws. *See Brown v. Pro Football, Inc.*, 518 U.S. 231, 240 (1996).

Hence why the Board's unexplained departure from established precedent is so disruptive. The gravamen of the Board's decision was that the ILWU could not perform certain work at Port of Portland Terminal 6 because that *particular* work had "never been a function performed by the employees [the ILWU] represent[s]" *at that terminal*. *Int'l Longshore & Warehouse Union, et al. ("ILWU")*, 363 N.L.R.B. No. 12, slip op. at 23 (Sept. 24, 2015). This same-work-at-the-same-location standard flatly contradicts the *ILA* cases and *California Cartage*, 822 F.2d

at 1207 ("the fact that longshoremen have never previously performed work at the exact same location does not prevent the work sought from being the functional equivalent of work the longshoremen have performed").

More fundamentally, the Board's decision contradicts the point of work-preservation agreements in the first place. If unions are to give up particular jobs or categories of work in response to technological change, they cannot reasonably demand the same work at the same locations—otherwise those jobs would not have become obsolete in the first place. A work-preservation agreement enables both sides to find other jobs that will substitute the jobs that are lost.

Worst of all, the Board's decision leaves multi-employer groups and unions with no explanation for its departure from established precedent. The Board made no attempt to discuss the Supreme Court's decisions in the *ILA* cases or this Court's decision in *California Cartage*. Even if the Board had the power to change its policy regarding work-preservation agreements, it would clearly have to do so through a reasoned decision that took account of its prior cases and controlling precedent from the Supreme Court and this Court. *E.I. Du Pont De Nemours & Co. v. NLRB*, 682 F.3d 65, 66 (D.C. Cir. 2012). Instead, the Board adopted a new standard altogether, leaving employers and unions alike to guess at how the law will be applied in future cases. The difference between the two approaches is stark: work-preservation agreements will be much less effective tools for resolving

labor disputes if the parties are limited to the same-work-at-the-same-location standard articulated by the Board in this case.

The panel's judgment does nothing to reconcile the Board's decision with existing precedent; the panel determined that it "need not opine" on this issue. *Int'l Longshore & Warehouse Union v. NLRB*, No. 15-1344, 2017 WL 5664740, at *1 (D.C. Cir. Nov. 6, 2017) (per curiam). Therefore, only the *en banc* Court's review can provide clarity on this exceptionally important legal question, which will affect the ability of employers and unions to resolve future disputes through work-preservation agreements.

II. The Panel's Endorsement Of The Board's Departure From Established Supreme Court Precedent Also Confuses The Critical "Right To Control" Analysis.

The Board's order (and panel's opinion) further compounds uncertainty regarding work-preservation agreements through its "right to control" analysis. Here, the Board again ignored well-established principles in the *ILA* cases and *California Cartage*: carriers (who are members of PMA bound by the ILWU-PMA multi-employer bargaining agreement) have the right to work performed on their cargo containers "by virtue of their ownership or leasing control of the containers." *ILA II*, 473 U.S. at 74 n.12.

This is another unexplained departure from precedent that will disrupt settled expectations that, for more than three decades since the *ILA* cases and

California Cartage, have governed the negotiation and enforcement of work-preservation agreements in the maritime industry.

A work-preservation objective must be directed at an employer that actually controls the work to be preserved. *ILA I*, 447 U.S. at 504. If an employer lacks that control, then the union must seek redress from a so-called "primary" employer; a union's efforts instead to pressure an unrelated business is a prohibited "secondary activity." *Id*. This is not merely a factual question to be decided under the "substantial evidence" standard, which was the basis of the panel's judgment upholding the Board's decision in this case. 2017 WL 5664740, at *1. It is also a legal question that derives from the carriers' proprietary interests in the containers that they own or lease. *See Cal. Cartage*, 822 F.2d at 1209-10 (asking whether certain employers "are bound by" contract giving control over assigning work). Indeed, the Supreme Court and this Court have both relied on the carriers' ownership or leasing interest in their containers in determining whether they have the right to control work performed on those containers. *Id.*

While ignoring this precedent, the Board rested its decision on the Port's "long-established allocation" of the dockside repair work "to its own electricians." *ILWU*, 363 N.L.R.B. No. 12, slip op. at 24. But this factual observation cannot be the end of the inquiry. The Port's historical assignment of work to its own electricians hardly eliminates the carriers' authority to control work performed on

the containers they own or lease. Indeed, it is possible for more than one employer to have the right to control this work. *Cal. Cartage*, 822 F.2d at 1210. The Board (and the panel) failed to reconcile the Port's interest in this work with the carriers' long-recognized right to control work performed on *their* containers. *ILA II*, 473 U.S. at 74 n.12.

This inexplicable deviation from Supreme Court and Circuit precedent introduces intolerable uncertainty into the law that has governed multi-employer work-preservation agreements for decades. PMA and other multi-employer bargaining representatives are left with no guidance as to whether the Board will adhere to the principles articulated in the *ILA* cases and *California Cartage* or, instead, apply the narrow factual analysis in this case.

Agreements critical to labor peace in the maritime industry and other industries of national importance are undermined by the uncertainty that the Board's order, and the panel's affirmance, creates. The *en banc* Court should rehear this case to eliminate this uncertainty and to bring the Board's order into conformity with the Supreme Court's and this Court's precedents.

Dated: December 27, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7), I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 2,590 words, excluding the parts exempted by Fed. R. App. P. 32(f) and Cir. R. 32(e)(1).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief was prepared in 14-point Times New Roman font using Microsoft Word.

Dated: December 27, 2017

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CERTIFICATE OF FILING AND SERVICE

I hereby certify, pursuant to Fed. R. App. P. 25(c) and Cir. R. 25(a), that on December 27, 2017, the foregoing Brief on Rehearing *En Banc* of Pacific Maritime Association as *Amicus Curiae* in Support of Petitioners was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter who are registered with the Court's CM/ECF system.

Dated: December 27, 2017

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